122-231

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 264.

ALEXANDER R. SHEPHERD, PLAINTIFF IN ERROR,

vs.

JOHN W. THOMPSON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 14, 1883.

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1 *Declaration, Notice to Plead, and Affidavit. Filed March 11th, 1880.*

In the Supreme Court of the District of Columbia, the 11th day of March, A. D. 1880.

JOHN W. THOMPSON, Plaintiff,
vs.
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709.

1. The plaintiff, John W. Thompson, sues the defendant, Alexander R. Shepherd, for that the said defendant, by the designation of Alex. R. Shepherd, on the 10th day of March, A. D. 1873, at the city of Washington, D. C., by his promissory note, now overdue, promised to pay to the order of the plaintiff, for value received, seven thousand dollars ($7,000) two years after date, with interest at the rate of eight per cent. per annum, payable semi-annually, but did not pay, and has not yet paid, the same; wherefore the plaintiff claims the sum of seven thousand dollars ($7,000), the amount of said note, with interest thereon at the rate of eight per centum per annum from the 10th day of March, A. D. 1873, besides costs of suit.

2 2. The plaintiff, John W. Thompson, sues the defendant, Alexander R. Shepherd, for that the said defendant, by the designation of Alex. R. Shepherd, on the 10th day of March, A. D. 1873, at the city of Washington, D. C., by his promissory note, now overdue, promised to pay to the order of the plaintiff, for value received, eight thousand dollars ($8,000) three years after date, with interest at the rate of eight per centum per annum, payable semi-annually, but did not pay, and has not yet paid, the same; wherefore the plaintiff claims the sum of eight thousand dollars ($8,000), the amount of said note, with interest thereon at the rate of eight per centum per annum from the 10th day of March, A. D. 1873, besides costs of suit.

3. The plaintiff, John W. Thompson, sues the defendant, Alexander R. Shepherd, for money payable by the said defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for work done and materials provided by the plaintiff for the defendant, at his request; and for money lent by the plaintiff to

3 the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them; and the plaintiff claims the sum of fifteen thousand dollars ($15,000), with interest thereon from the 10th day of March, A. D. 1873, according to the particulars of demand hereto annexed, besides costs of suit.

R. T. MERRICK,
M. F. MORRIS,
Att'ys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court, occurring 20 days after service hereof; otherwise judgment.

R. T. MERRICK,
M. F. MORRIS,
Attorneys for Plaintiff.

Particulars of Demand.

Copy of notes.

1. $7,000. WASHINGTON, D. C., *March 10th*, 1873.

Two years after date I promise to — the order of John W. Thompson seven thousand dollars, value received, with interest at the rate of eight per centum per annum, payable semi-annually.

(Signed) ALEX. R. SHEPHERD.

4 2. $8,000.00. WASHINGTON, D. C., *March 10th*, 1873.

Three years after date I promise to pay to the order of John W. Thompson eight thousand dollars, value received, with interest at the rate of eight per centum per annum, payable semi-annually.

(Signed) ALEX. R. SHEPHERD.

John W. Thompson, the plaintiff in the above-entitled cause, being duly sworn, doth depose and say that he is the holder and owner of the two several promissory notes mentioned in the foregoing declaration, and whereof true copies are appended as the particulars of demand annexed to the common counts in said declaration; that the facts stated in said declaration are true; that the plaintiff's cause of action in the premises against the defendant, Alexander R. Shepherd, consists of the said two several promissory notes and the said defendant's failure to pay the same; that
5 said promissory notes were executed and delivered by said defendant to the plaintiff in consideration of the sum of fifteen thousand dollars, balance due upon purchase-money of property sold by the plaintiff to said defendant on the 10th day of March, A. D. 1873; that said notes are the genuine promissory notes of said defendant, and the signatures thereto are the genuine signatures of said defendant, Alexander R. Shepherd; that on the first-mentioned of said notes the said defendant paid the interest to the 10th day of September, A. D. 1874, and on the 14th day of November, A. D. 1874, he paid two thousand dollars, and on the 27th day of January, A. D. 1875, he paid five hundred and fifty dollars, and on the 22ond day of June, A. D. 1875, he paid one thousand dollars; that on the second-mentioned of said notes the said defendant paid the interest to the 10th day of March, A. D. 1875, but has made no further payments; that on account of the said first-mentioned note there is now due and payable by said defendant to the plaintiff the sum of three thousand six hundred and seventy-seven dollars and
6 twenty-eight cents ($3,677.28), with interest from the 22ond day of June, A. D. 1875; that on account of said second note there is now due and payable by said defendant to the plaintiff the

sum of eight thousand dollars ($8,000), with interest from the 10th day of March, A. D. 1875; that on account of both of said notes there is now due and payable by the said defendant to the plaintiff, exclusive of all set-offs and just grounds of defense, the sum of $11,677.28, with interest on $3,677.28 thereof from the 22ond day of June, A. D. 1875, and on $8,000 thereof from the 10th day of March, A. D. 1875, at the rate of eight per centum per annum.

And this affiant further says that frequently within the three years before the date hereof, and especially on the 21st day of June, A. D. 1877, and again on the 25th day of April, A. D. 1879, the said defendant admitted his indebtedness to this affiant on account of said notes and promised to pay the same.

JOHN W. THOMPSON.

7 Subscribed and sworn to before me this 9th day of March, A. D. 1880.

[Seal of U. S. Commissioner.]

JOHN B. LARNER,
U. S. Commissioner.

Summons. Issued March 11th, 1880.

In the Supreme Court of the District of Columbia, the 11th day of March, 1880.

JOHN W. THOMPSON, Pl'ff,
vs.
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court, on the first day of its first special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

[Seal of Court.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Cl'k.*

8 NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

On back.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant the 15th day of March, 1880.

F. DOUGLASS, *Marshal.*

Defendant's Pleas. Filed April 15th, 1880.

In the Supreme Court of the District of Columbia.

JOHN W. THOMPSON
vs.
ALEXANDER R. SHEPHERD. } At Law. No. 21709.

1. For plea to the first count of the plaintiff's declaration, the defendant says that he did not make the said promissory notes, as alleged.

2. And, for a further plea to said first count, he says that the alleged cause of action did not accrue within three years before
9 this suit.

3. For plea to the second count of said declaration the defendant says that he did not make the said promissory note as alleged.

4. And for a further plea to said second count he says that the alleged cause of action did not accrue within three years before this suit.

5. For plea to the third count of said declaration the defendant says that he never was indebted as alleged.

6. And for a further plea to said third count he says that the alleged cause of action did not accrue within three years before this suit.

WM. F. MATTINGLY,
A. C. BRADLEY,
Att'ys for Defendant.

DISTRICT OF COLUMBIA, *ss:*

Alexander R. Shepherd, being duly sworn, deposes and says that he is the defendant in the above-entitled cause; that the said promissory notes sued on were more than three years overdue at the time of the bringing of this action, and defendant further says
10 that he denies that within the three years before the date of plaintiff's affidavit he frequently, or on the 21st day of June, 1877, or on the 25th day of April, 1879, or at any other time within said period, admitted his indebtedness to the plaintiff on account of said notes, and promised to pay the same.

ALEX. R. SHEPHERD.

Subscribed and sworn to before me this 14th day of April, 1880.
[NOTARIAL SEAL.] J. M. YOUNG,
Notary Public.

Joinder of Issue. Filed April 26th, 1880.

In the Supreme Court of the District of Columbia.

JOHN W. THOMPSON
vs.
ALEXANDER R. SHEPHERD. } At Law. No. 21709.

The plaintiff joins issue with the defendant upon his first, second, third, fourth, fifth, and sixth plea.

R. T. MERRICK,
M. F. MORRIS,
Att'ys for Plaintiff.

11 Take notice that the issue joined in this cause will be tried at the next term of this court.

R. T. MERRICK,
M. F. MORRIS,
Atty's for Pl'ff.

To Wm. F. Mattingly & A. C. Bradley, atty's for defendant.

JOHN W. THOMPSON
vs.
ALEXANDER R. SHEPHERD. } At Law. No. 21709.

R. T. Merrick & M. F. Morris, plaintiff's attorneys; Wm. F. Mattingly & A. C. Bradley, defendant's attorneys.
Last pleadings filed April —, A. D. 1880.

First Trial.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court, commencing the fourth Monday, being the 24th day, of January, A. D. 1881.

MONDAY, *January* 24, *A. D.* 1881.

By order of Arthur MacArthur, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

TUESDAY, *April 19th*, 1881.

12 Session resumed pursuant to adjournment, MacArthur, presiding.

JOHN W. THOMPSON, Pl'ff,
vs.
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709. Cal. 423.

Now comes here as well the plaintiff, by his attorneys, Messrs. Merrick & Morris, as the defendant, by his attorneys, Messrs. Mattingly & Bradley, and a jury of good and lawful men of this District, to wit, Francis S. Barbarin, Samuel J. Spearing, Cyrus S. King, John A. Gray, Edward Gorman, James M. Darnell, George H. Thompson, David B. Jackson, Owen T. Sturgess, Cole Ward,

Phillip M. May, and John F. Bridget, who being duly sworn to try the issue above joined, are respited until the meeting of the court to-morrow morning.

WEDNESDAY, *April 20th*, 1881.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

JOHN W. THOMPSON, Pl'ff,
vs
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709. Cal. 423.

13 Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after the case is given them in charge, retire to their room to consider of their verdict, with permission, if they agree during the recess of the court, after reducing their verdict to writing, signing, sealing, and delivering the same to their foreman, to separate until the meeting of the court to-morrow morning.

THURSDAY, *April 21st*, 1881.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

JOHN W. THOMPSON, Pl'ff,
vs.
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709. Cal. 423.

Now again come here the parties aforesaid in manner aforesaid, and the same jury return into court and on their oaths say they find said issue in favor of the defendant; therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff the
14 costs of his defence, taxed at $—, and have execution thereof

SATURDAY, *April 23rd*, 1881.

Session resumed pursuant to adjournment, MacArthur, justice presiding.

JOHN W. THOMPSON, Pl'ff,
vs.
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709.

The plaintiff, John W. Thompson, comes and moves the court to set aside the verdict of the jury in the above-entitled cause and for a new trial thereof, and for grounds of this motion he says:

1st. The said verdict is contrary to the evidence adduced in the cause.

2. That said verdict is contrary to law and to the instructions of the court.

3. That the plaintiff should have a new trial for the reasons apparent in the bills of exceptions taken in the cause.

MONDAY, *May 2nd, A. D.* 1881.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

15 JOHN W. THOMPSON, Pl'ff, *vs.* ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709.

Upon hearing so much of the plaintiff's motion for a new trial as is addressed to the discretion of the court it is considered that the same be, and is hereby, overruled.

FRIDAY, *May 6th, A. D.* 1881.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

JOHN W. THOMPSON, Pl'ff, *vs.* ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709.

Now again comes here the plaintiff, by his said attorneys, and tenders to the court here his bills of exceptions to the rulings of the court on the trial of this cause, and prays that they may be duly signed, sealed, and duly made a part of the record, which is done accordingly.

Bills of Exceptions. Filed May 6th, 1881.

16 In the Supreme Court of the District of Columbia.

JOHN W. THOMPSON, Pl'ff, *vs.* ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709.

First exception.

1. At the trial of this cause, the promissory notes in suit having been duly proved and offered in evidence to the jury, the plaintiff, further to maintain the issues on his part joined, offered in evidence a deed of conveyance from the defendant to one William Thompson of certain real estate in trust to secure the payment to the plaintiff of said notes, which deed of conveyance is in the words and terms following, to wit:

This indenture, made this tenth day of March, in the year of our Lord one thousand eight hundred and seventy-three, between Alexander R. Shepherd and Mary G. Shepherd, his wife, of the city of Washington, in the District of Columbia, of the first part, and William Thompson, of the same place, of the second part:

Whereas the said Alexander R. Shepherd is justly indebted unto John W. Thompson in the sum of twenty-two thousand —
17 (being the balance of purchase-money due on the hereinafter-described lots of ground), for which amount he, the said Alexander R. Shepherd, has passed his three promissory notes, bearing even date with these presents and payable to the order of the said

John W. Thompson, two of the said notes being for the sum of seven thousand dollars each and payable, respectively, in one and two years after date, and the third of said notes being for the sum of eight thousand dollars and payable in three years after date, all of said notes bearing interest at the rate of eight per cent. per annum, interest payable semi-annually, and to secure the punctual payment of said notes and interest and costs the parties of the first part execute these presents:

Now, therefore, this indenture witnesseth: That the said parties of the first part, for and in consideration of the premises aforesaid and, further, the sum of one dollar in lawful money of the United States, * * * have granted, bargained, sold, * * * and do by these presents grant, bargain, and sell, * * * unto the said party of the second part, his heirs and assigns, all those pieces
18 or parcels of ground being and situate in the city of Washington, in the District of Columbia, and known and described as original lot numbered six (6), in square numbered one hundred and sixty-four (164), and lots lettered C, D, G, K, L, M, N, P, and Q, in Harris and Grammer's recorded subdivision of part of said square numbered one hundred and sixty-four (164), together with the improvements: * * *

To have and to hold the said described real estate and premises and appurtenances unto and to the use of the said party of the second part, his heirs and assigns.

In and upon the trusts, nevertheless, * * * (Here follow the trusts usually contained in a deed of trust.) * * *

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

(Signed) ALEX. R. SHEPHERD. [SEAL.]
(Signed) MARY G. SHEPHERD. [SEAL.]

Duly witnessed and acknowledged.

Indorsement: Received for record on the 13th day of March, A. D. 1873, and recorded in liber No. 712, folio 128, one of the
19 land records for the District of Columbia, and examined by (Signed) S. Wolf, recorder.

And thereupon, for the purpose of showing that on the 21st day of June, A. D. 1877, to wit, within three years before the institution of this suit, the defendant had admitted the said notes as subsisting indebtedness, which he was then liable and willing to pay, the plaintiff offered in evidence, having first duly proved the execution thereof by all the parties whose names are attached thereto, the following paper writing, to wit:

In consideration of the indebtedness described in the deed of trust to William Thompson, trustee, executed March 10th, 1873, and recorded in liber No. 712, folio 128, of the land records of the District of Columbia, the demand and claim of A. C. Bradley to the use of A. R. Shepherd and others against the United States for the use and occupation of the premises No. 915 E St. N. W., and all the proceeds

thereof, and the moneys derived therefrom, are hereby pledged
20 and made applicable to the payment of said indebtedness,
with interest thereon at the rate of eight per cent. per annum until paid. And it is hereby covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be indorsed and delivered to the trustees named in said trust, and the proceeds thereof, less all proper costs and charges, be applied to the payment of the said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay.

Witness our hands this 21st day of June, 1877.

(Signed) A. C. BRADLEY.
ALEX. R. SHEPHERD.

The undersigned trustees hereby consent and concur in the above assignment.

(Signed) GEO. TAYLOR, *Trustee.*
SAM. CROSS, *Trustee.*
PETER F. BACON, *Trustee.*

To the introduction of which paper writing in evidence the defendant, by his counsel, objected, and the court sustained his objection, and would not permit said paper writing to be read
21 or given in evidence to the jury; to which ruling of the court the plaintiff, by his counsel, excepted and prayed the court to sign and seal this his first bill of exceptions, which is accordingly done this 20th day of April, A. D. 1881.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Second Exception.

2. After the signing and sealing of the foregoing first bill of exceptions, which is made part of this second bill of exceptions, having offered evidence tending to prove that on the 15th day of November, A. D. 1876, the defendant was in embarrassed circumstances, the plaintiff, further to maintain the issues upon his part joined, offered in evidence a deed of conveyance from the defendant to certain trustees, George Taylor, Samuel Cross, and Peter F. Bacon, bearing date the said 15th day of November, A. D. 1876, which deed, duly recorded among the land records of the District of Columbia, was in the words and terms following, to wit:

This indenture, made this 15th day of November, in the year eighteen hundred and seventy-six (1876), by and between
22 Alexander R. Shepherd and Mary G. Shepherd, his wife, of the city of Washington, District of Columbia, of the first part, and George Taylor, Henry A. Willard, and Samuel Cross, of the second part:

Whereas the said Alexander R. Shepherd is indebted to divers persons in divers sums of money, and is desirous to secure the payment thereof by a conveyance of his property and effects for that purpose; and whereas his unsecured debts, so far as the same are

known to him at this time, amount to about the sum of three hundred and ten thousand dollars ($310,000); and whereas, in order that his unsecured creditors may have their evidences of indebtedness in a marketable shape, an- for the purposes of this trust, he has executed his certain promissory notes bearing even date with these presents, each for the sum of one hundred dollars ($100), and payable five years after date, with interest coupons attached at the rate of six per cent., payable semi-annually after the expiration of the first year, said notes being equal in amount to the amount of
23 his unsecured indebtedness, be the same more or less than said sum of $310,000, and being payable solely out of the proceeds of the property included in and conveyed by these presents; and whereas the said parties of the first part are desirous to secure the payment of said notes and coupons when and as the same shall become due and payable, they therefore execute these presents.

Now, therefore, this indenture witnesseth: That the said parties of the first part, for and in consideration of the premises and of the sum of five dollars, * * * have granted, bargained, and sold, conveyed, assigned, transferred, and set over, and by these presents do grant, bargain, and sell, convey, assign, transfer, and set over, unto the said parties of the second part and the survivors and survivor of them, his heirs, executors, administrators, and assigns, all and singular the lands, tenements, hereditaments, and appurtenances, stocks, promissory notes, debts, choses in action, claims, demands, property, and effects of every description, fully and particularly enumerated and described in a schedule thereof, hereto
24 annexed, marked "Schedule A," the same being and intended to be all the property and estate of every kind whatsoever of him, the said Alexander R. Shepherd, except his interest in the assets of A. R. Shepherd & Co.:

To have and to hold in trust, nevertheless, to and for the use and purposes following, to wit:

In trust to suffer and permit the said Alexander R. Shepherd to remain in the possession and receive the rents and profits thereof until default be made in the payment of said promissory notes or any of said interest coupons, and upon the full payment of said promissory notes, &c., &c., to release and reconvey all and singular the property aforesaid, or so much therof as may be undisposed of, unto the said Alexander R. Shepherd, his heirs, executors, admistrators, or assigns.

But should default be made * * * (the trustees are to take possession, sell, and dispose of the property and pay the debts).

And upon this further trust to make all such conveyances and transfers of said property or any portion thereof as they may be required to make by the said Alexander R. Shepherd for the
25 purpose of perfecting and carrying out any settlement, sale, or exchange which the said Shepherd may make for the benefit of the creditors secured hereby. * * * Said creditors are specified in Schedule B, hereto annexed; * * * and the said Alexander R. Shepherd doth hereby covenant * * * that all the property conveyed by these presents, and all the rents, issues,

profits, and proceeds thereof which shall come into his hands shall be used, managed, and applied by him solely for the interest, benefit, and advantage of the holders of the notes aforesaid, &c., &c. * * *

In testimony whereof, &c., &c.

(Signed) ALEX. R. SHEPHERD. [SEAL.]
(Signed) MARY G. SHEPHERD. [SEAL.]

Witness:
D. R. BELL.

We do hereby accept the foregoing trust.

(Signed) GEO. TAYLOR.
SAM. CROSS.

Witness:
D. R. BELL.

(Here follows acknowledgment in due form.)

Schedule Assets A. Unincumbered.
Court of Claims on E-street property ($6,000).
Schedule B. Schedule of creditors.
J. W. Thompson.

And thereupon the plaintiff again offered in evidence the
26 following paper writing, being the same paper writing mentioned in the plaintiff's first bill of exceptions, to wit:

In consideration of the indebtedness described in the deed of trust to William Thompson, trustee, executed March 10th, 1873, and recorded in liber No. 712, folio 128, of the land records of the District of Columbia, the demand and claim of A. C. Bradley, to the use of A. R. Shepherd and others, against the United States for the use and occupation of the premises No. 915 E St., northwest, and all the proceeds thereof and the moneys derived therefrom are hereby ple-ged and made applicable to the payment of said indebtedness, with interest thereon at the rate of eight per cent. per annum until paid; and it is hereby covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be indorsed and delivered to the trustee named in said trust, and the proceeds thereof, less all proper costs and charges, be applied to the payment of the said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay.

Witness our hands this 21st day of June, 1877.

27 (Signed) A. C. BRADLEY.
ALEX. R. SHEPHERD.

The undersigned trustees hereby consent and concur in the above assignment.

(Signed) GEO. TAYLOR, *Trustee.*
SAM. CROSS, *Trustee.*
PETER F. BACON, *Trustee.*

To the introduction of which paper in evidence the defendant, by his counsel, objected, and the court sustained his objection and would not permit said paper writing to be read or given in evidence to the jury; to which ruling of the court the plaintiff, by his counsel, excepted, and prayed the court to sign and seal this his second bill of exceptions, which is accordingly done this 20th day of April, A. D. 1881.

ARTHUR MacARTHUR, *Justice.* [SEAL.]

Third Exception.

3. After the signing and sealing of the foregoing second bill of exceptions, which is made a part of this third bill of exceptions, the plaintiff, further to maintain the issues on his part joined, offered in evidence a deposition of the defendant, Alexander R. Shepherd, having proved his signature thereto, taken on the 25th day of
28 April, A. D. 1879, to wit, within three years before the institution of this suit, at the city of Washington, in the District of Columbia, before an examiner in chancery, in a cause No. 5433 on the equity docket of the supreme court of the District of Columbia, wherein one Johnson and others are complainants and Nathaniel Fugett and others are defendants, said Thompson, but not said Shepherd, being a party to said cause; which deposition was in the words and terms following, to wit:

Deposition of Alexander R. Shepherd.

Q. Have you ever assigned or made over to Mr. Thompson anything in satisfaction of this claim?

A. I assigned certain rents of house 915 E St. to Mr. Thompson, which assignment was concurred in by *any* trustee-, and which will aggregate about $5,400. A restraining order issued from the equity court restraining the payment of any past-due rents, which order has not yet been rescinded. There is little doubt but that Mr. Thompson will receive this sum, as this assignment was made before this order was issued. * * *

To the introduction of which deposition in evidence the
29 defendant, by his counsel, objected, and the court sustained his objection and would not permit the said deposition to be read in evidence to the jury; to which ruling of the court the plaintiff, by his counsel, excepted, and prayed the court to sign and seal this his third bill of exceptions, which is accordingly done this 20th day of April, A. D. 1881.

ARTHUR MacARTHUR, *Justice.* [SEAL.]

Fourth Exception.

4. After the signing and sealing of the foregoing third bill of exceptions, which is made part of this fourth bill of exceptions, the plaintiff thereupon offered in evidence the record of said cause No. 5433, equity, and especially that portion of the deposition of said de-

fendant therein as refers to said indebtedness; which portion is in the words and terms following, to wit:

Q. Have you ever assigned or made over to Mr. Thompson anything in satisfaction of this claim?

A. I assigned certain rents of house 915 E street to Mr. Thompson, which assignment was concurred in by *any* trustees and
30 which will aggregate about $5,400. A restraining order issued from the equity court restraining the payment of any past-due rents, which order has not yet been rescinded. There is but little doubt but that Mr. Thompson will receive this sum, as this assignment was made before this order was issued.

To the introduction of which record and deposition and part of deposition the defendant, by his counsel, objected, and the court sustained his objection and would not permit said record or deposition or part of deposition to be read or given in evidence to the jury; to which ruling of the court the plaintiff, by his counsel, excepted, and prayed the court to sign and seal this his fourth bill of exceptions, which is accordingly done this 20th day of April, A. D. 1881.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Fifth Exception.

5. After the signing and sealing of the foregoing fourth bill of exceptions, which is made part of this fifth bill of exceptions, the plaintiff further offered testimony as follows:

31 By GEORGE TAYLOR: That he was one of Shepherd's trustees under his deed of trust to secure creditors of Nov. 16th, 1876. Shepherd had failed, unable to meet his obligations, which were in the neighborhood of $1,300,000; that he had several conversations with Shepherd after the date of the deed of trust, and down to and after the assignment of June 21st, 1877, signed by him. He said that he owed the plaintiff and was very anxious to settle with him; that the assignment was made for the purpose of getting plaintiff to release some property which he had as security for the indebtedness so as to use it in paying debts; it was to satisfy plaintiff as far as the rents would go, and to get some releases. Witness afterwards indorsed a draft presented to him by Nathaniel Wilson pursuant to that contract.

By NATHANIEL WILSON: That he was defendant's attorney in prosecuting a claim against the U. S. for rent of house No. 915 E street; got judgment for $1,800 and a draft for the amount in payment. Shepherd indorsed the draft, told him to get the indorsement of the trustees, and said the money was to be paid to Thompson in pursuance of an agreement we had frequently men-
32 tioned, upon an indebtedness due pl'ff of more than that; the indebtedness was $13,000 or $14,000, evidenced by notes secured by deed of trust to Wm. Thompson on Conn. ave. property. The def't told him to pay the proceeds of the draft, when received, to pl'ff in respect of that indebtedness. In these conversations nothing was said concerning the assignment, the paper itself, and no

reference was made to any particular paper. At the time def't indorsed the draft he attached the condition that there should be a lease of a piece of property covered by that deed of trust. The release had not been made that he knew of.

Recalled:

That after suit brought in Court of Claims and before the assignment pl'ff was pressing his debt and Shepherd asked him to see pl'ff and propose to pay him the proceeds of the suit and see if he would accept it and postpone proceedings; pl'ff was going to advertize under the deed of trust. He saw pl'ff and the result was an assignment of the proceeds to him. Def't told him to see Thompson and say that if he wouldn't sell the property he would pay him the proceeds of the claim on the debt. He communicated this to pl'ff and the property was not sold; this was just before the 21st day of June, 1877.

33 By the PL'FF: That he was about advertising the property under the deed of trust, and Mr. N. Wilson came to him and said that def't had a claim pending in the Court of Claims that he would tender. He said that def't would give him (Thompson) the proceeds of the claim if sale — not made, and he desisted. The debt designated was the debt sued on in this action, and evidence having been adduced by the plaintiff tending to show that a draft, which was in the words and terms following, to wit:

TREASURY OF THE UNITED STATES, *April 8th*, 1879.

Pay to the order of Alexander R. Shepherd, George Taylor, Samuel Cross, and Peter F. Bacon one thousand eight hundred dollars ($1,800), registered April 8, 1879.

W. P. TITCOMB,
Assistant Register of the Treasury.

On the back it is endorsed: Pay to the order of Nathaniel Wilson, C. Bradley, Alexander R. Shepherd, George Taylor, Samuel
34 Cross, Peter F. Bacon, Nathaniel Wilson; White, cashier, payable to the order of Andrew C. Bradley, Alexander R. Shepherd, George Taylor, Samuel Cross, and Peter F. Bacon, had been issued by the United States and delivered to Nathaniel Wilson as attorney for the defendant, Alexander R. Shepherd, in payment of a claim of said parties against the United States on account of the rent of certain premises in the city of Washington known as 915 E street, and that said Wilson had procured the indorsements of said payees to said draft for the purpose of collecting the same and paying over the proceeds to the plaintiff in this suit; thereupon the plaintiff, further to maintain the issues on his part joined, offered to prove by said Nathaniel Wilson, called as a witness on behalf of the plaintiff, that, in procuring the indorsement of said defendant Shepherd to said draft he, said Wilson, was acting under the instruction to him of said defendant of June 21, 1877, evidenced by the paper writing of that date, hereinbefore referred to; to the introduction of

which testimony the defendant, by his counsel, objected, and
35 the court sustained his objection and would not permit such testimony to be given to the jury; to which ruling of the court the plaintiff, by his counsel, excepted, and prayed the court to sign and seal this his fifth bill of exceptions, which is accordingly done this 20th day of April, A. D. 1881.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Sixth Exception.

6. After the signing and sealing of the foregoing fifth bill of exceptions, which is made part of this sixth bill of exceptions, the plaintiff offered further testimony tending to prove the issues on his part joined and then rested; and thereupon, in pursuance of agreement of counsel, the defendant's counsel read in evidence the affidavit of the defendant filed with his pleas in the cause and then rested; and thereupon the defendant, by his counsel, requested the court to instruct the jury as follows: "The plaintiff in this action is not entitled to recover unless he proves that within three years prior to the bringing this suit the defendant promised to pay the sum sued for, and this ought to be proved in a clear and
36 explicit manner and be, in its terms, unequivocal and determinate;" which instruction the court granted and gave to the jury; to which ruling of the court the plaintiff, by his counsel, excepted, and prayed the court to sign this his sixth bill of exceptions, which is accordingly done this 20th day of April, A. D. 1881.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Seventh Exception.

7. After the signing and sealing of the foregoing sixth bill of exceptions, which is made part of this seventh bill of exceptions, the defendant further prayed the court to instruct the jury as follows: "If the jury believe from the evidence that the authority — to Nathaniel Wilson to pay the proceeds of the $1,800 draft in evidence to Mr. Thompson was upon the condition that he should release certain real estate from the lien of a deed of trust, then the plaintiff is not entitled to recover by reason of the testimony relative thereto, he not having given any evidence of the performance of said condition;" which prayer the court granted and gave such instruction to the jury; to which ruling of the court the
37 plaintiff, by his counsel, excepted, and prayed the court to sign and seal this his seventh bill of exceptions, which is accordingly done this 20th day of April, A. D. 1881.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Eighth Exception.

8. After the signing and sealing of the foregoing seventh bill of exceptions, which is made part of this eighth bill of exceptions, the plaintiff, having offered certain prayers which were granted, further prayed the court to instruct the jury as follows: "If the jury find

from the evidence that defendant at any time within three years before the bringing of this suit made an unqualified acknowledgment of the debt upon which this suit is brought, then the law implies a promise which will remove the bar of the statute of limitations, and an express promise to pay said debt is not necessary;" which prayer the court overruled and refused to give such instructions to the jury; to which ruling of the court the plaintiff, by his counsel, excepted, and prayed the court to sign and seal this his eighth bill of exceptions, which is accordingly done this 20th day of April, A. D. 1881.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

38 After the signing and sealing of the foregoing eighth bill of exceptions, which is made part of this ninth bill of exceptions, the court proceeded to charge the jury as follows:

The COURT: I do not wish to put the jury to any further inconvenience than they have been submitted to during the term; but, as we are approaching the end of the term, we want to accomplish as much as possible within the last few days. I will, therefore, ask you to take the case in your hands to-night, as there are several other cases in which parties have been in attendance a great deal to their inconvenience.

Now, the statute of limitations, which is set up as a defense to this action, is a bar to any recovery upon the debt itself, unless there has something occurred to take it out of the operation of that statute. The statute, as has been presented to you by counsel on both sides, was enacted for the purpose of quieting claims that have existed long enough; that ought to have been settled if they were not settled, and upon the presumption that the means
39 of establishing the claims have been imperilled, or that the claims themselves have been paid. It therefore simply denies to the creditor, under such circumstances, the advantage of coming into a court and enforcing his claim. It does not annihilate the indebtedness itself; that is in existence sufficiently to form a foundation for a new claim as a consideration for taking it out of the statute of limitations by a new acknowledgement of it on the part of the defendant or the party that is obligated by the indebtedness originally. It is for this reason that the law holds that a case outlawed may be taken out of the operation of that statute by a new promise. The original consideration is revived by it and the plaintiff's right of action restored, and that is the way the defense in this case is met by the plaintiff; he alleges and sets up a new promise.

Some fear was expressed by the counsel that you might be misled by the term new promise. This promise may be an express contract, or it may be implied from circumstances. If the
40 new promise exists in the form of an express promise, of course when it is proved it speaks for itself, and either amounts to a promise or not. An express promise is not pretended in this case, but a promise implied from circumstances, coupled with expressions at the same time—coupled with statements made by the defendant Shepherd.

Now, there are various circumstances from which this promise may be implied, and when it is implied it is just as binding and valid as if it were express. The case which has been so often referred to provides that where the party acknowledges that the debt is still due, coupled with a willingness to pay it, that from those two circumstances a promise may be implied—that is, the law upon these circumstances raises a promise; whether this is made in express terms or not the law raises from those circumstances a promise, and it is upon that promise that the plaintiff has to rely, in such cases, in the absence of an express promise, so that I have no doubt you will clearly understand the difference when, therefore, the court instructs you, either in writing or verbally, that it is in-
41 cumbent upon the plaintiff to prove a new promise—I mean a promise of that description, either express or implied.

Another circumstance from which a new promise is often inferred, and, indeed, as often spoken of by the courts, and is the strongest possible circumstance from which a new promise can be inferred, is the part payment of a debt, not in settlement, but a part payment, because if a debt is partly paid by a party, coupled with a qualification that it is in full settlement when it has been outlawed, — cannot be called a new promise under such circumstances; but a part payment of a debt without any qualifications is the strongest presumption in law of a new promise, because it is supposed that a party would not pay the part of a debt which he knew to be outlawed, and could not be collected against him unless he was willing to pay it, and any promise or any proposition that a party may make for the purpose, as he supposes, of obtaining an advantage for himself which has been complied with by the plaintiff upon the terms proposed by the debtor would also be an acknowledgment from which a new promise might be inferred—that is, it is a recognition
42 of the debt; it is a willingness to pay it upon certain conditions. If the party accepts that proposition and performs the condition, then it becomes evidence for a new promise upon which an action may be brought by the creditor.

About these propositions the court entertains no doubt, and counsel very frankly admit here, that all conditional admissions of the debt, all conditional promises to pay the debt, do not raise the presumption of a new promise unless those conditions are performed by the other party. Therefore all the testimony here in regard to the acknowledgment of the indebtedness — but a determination to resist it. (All testimony here with reference to an acknowledgment of this debt with a view of obtaining a release of property from the operation of an incumberance, which condition has not been complied with, *are* to be discarded by the jury as not being a foundation upon which a new promise could be established.) You are only to consider in this case any recognition of any acknowledgment of the indebtedness which the defendant might have made for the purpose of gaining an advantage, and if that advantage has been
43 rendered to him, why, the presumption of law growing out of those circumstances would be a promise in regard to the whole of the indebtedness.

It appears in the present case a trust deed had been executed and an assignment also. Mr. Shepherd appears to have been interested in the claim against the Government, and he proposed that the proceeds of this claim should be transferred to Mr. Thompson, but it appears before they reached Mr. Thompson they were intercepted by a process of this court, so that really they never reached their destination. (Here I desire to say that this assignment, which has been the object of so much discussion and frequent ruling during the progress of this trial, cannot be used as testimony in this case at all. You are therefore to discard that matter from your minds, and you will confine your consideration here to the verbal testimony of the witness).

I have this to say about the verbal testimony: that if it shall appear satisfactory to you that Mr. Shepherd authorized a proposition to be made to the plaintiff to the effect that he could have the
44 proceeds of that claim if he would desist from advertising the property for sale which appears to have been incumbered by this trust deed, and the property at that time was threatened with an advertisement for sale under the deed; and if it should further appear to you that the advertisement was not published, that the sale did not take place in consequence of this proposition, that it would be evidence from which the jury might presume a new promise. This qualification, perhaps, ought to go along with this instruction. It appears that there was an incumbrance on the property. If Mr. Shepherd restricted the proposition which he authorized his attorney to make to the plaintiff simply to the incumbrance itself, and not to the debt at all, not having any relation to his personal liability upon the indebtedness, that is to be taken into consideration, as explained by the counsel. The trust deed is subject to a statutory limitation of 20 years; the notes are subject to a limitation of three years. The trust deed, therefore, as a lien on the property and as a security for the payment of those notes, could be enforced at any time within 20 years; but upon the action brought upon the notes themselves the statutory limitation applicable
45 to personal action would apply, and would cut off the plaintiff from his remedy unless it was brought within 3 years from the time the right of action accrued.

If, however, the communication was unqualified, and was not restricted to the mere personal liability of Mr. Shepherd to be sued upon the notes, then I think the whole proposition must be regarded by the jury as a very strong evidence of a new promise, and if that promise was made at any time or if that transaction took place at any time within 3 years previously to the bringing of the suit, it would enable the plaintiff to maintain his action. If, on the other hand, it did not relate to his personal liability on the notes, but related entirely to the right of the plaintiff to enforce his lien upon the property at any time within the 20 years, it would very much modify the presumption. The presumption growing out of circumstances of that character would not be so strong as a general recognition of the debt and a willingness to pay it at any time.

I do not know that I can make myself thoroughly under-
46 stood upon this point, but I mean if the proposition was a general proposition with regard to the indebtedness, including the condition that the property was not to be offered for sale if the proposition was accepted, then the new promise would arise. If it was a limited proposition, having reference exclusively to the real estate secured itself, without any reference to the indebtedness, the personal indebtedness, but simply for the purpose of preserving the property from sacrifice, I think it might be a consideration with the jury that would relieve the promise of that binding obligation which it would otherwise have. It will be a matter, however, for you to determine upon the testimony in the case.

Now, in regard to that matter, you will have to consider the whole testimony—the testimony of Taylor and the testimony of Mr. Cross, I think. The testimony of Mr. Taylor, at all events, was to the effect that he had frequent conversations with Mr. Shepherd, and that in those conversations Mr. Shepherd acknowledged the debt to be due and manifested a desire to have the matter settled,
47 and I think he closed his testimony by saying that what he wanted was to have his property released for the purpose of settling with his other creditors. I forget whether Mr. Cross made a similar statement, but you will remember whether he did or not. All these circumstances may be considered by you with reference to Mr. Shepherd's intention when he sent a proposition, if he did send one, to Mr. Thompson with regard to not releasing his property, but I refer now to the proposition that he made of keeping the property from sale at that time.

I think I have covered the instructions asked for on both sides of this case in my general charge to you.

There is another point that, perhaps, I ought not to pass in silence, and that is the character of the new promise in regard to its definiteness—with regard to the identity of the indebtedness, rather. Now, it is a rule that a new promise with regard to a floating indebtedness would not be good without it was specified and reduced to something like certainty; therefore a man upon an account may make some kind of an acknowledgment that he is indebted
48 upon an open account which lacks that element of certainty which would constitute a new promise. The new promise must be certain in its terms, explicit both in regard to the debt to which it refers and in regard to the amount of the indebtedness; but there must be a reasonable certainty in those things (because we can have no absolute certainty in anything scarcely, and if the law paused until it could adjudicate upon absolute certainty it would have to stand still, and the jury would have to be discharged from any duty here); but we have to proceed here upon reasonable presumptions, and when the promise refers to an indebtedness that is capable upon inspection of being made certain, as a bond or a promissory note, or some other instrument in which the sums are specifically stated, and if the new promise appears in such instruments, it appears to the court that that is all the certainty we can expect here; and if payments have been made and are a matter of record

of course they are to be taken into consideration. There is a means pointed out at the time of making the amount certain,
49 and certain without any confusion, because it is a mere matter of computation. I therefore think that if the new promise, if one were made here, related to the indebtedness that was secured by the trust deed which has been in evidence here, and that was executed to secure the notes in suit, it would be a sufficient identification of the indebtedness, although no actual amount of indebtedness was stated at the time.

If you find in favor of the plaintiff you will give him a verdict for what is due upon the notes, together with interest from the time they became due. Of course, you will make allowance for all payments that you will find upon the notes, as well as the $500. The $500 dollars being indorsed on the notes you will allow that also.

If, upon the whole, you think the plaintiff, upon whom the burden of proof is imposed in a case of this kind—that is, so far as a new promise is concerned—has not specified clearly that it took place—and by a new promise I mean according to the explanation
50 I have already made—you may return a verdict for the defendant.

And to the portions of said charge inclosed in brackets with red ink the plaintiff, by his counsel, excepts, and prayed the court to sign and seal this his ninth bill of exceptions, which is accordingly done this 20th day of April, A. D. 1881.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

First Trial.

Proceedings before the supreme court of the District of Columbia, in general term, beginning on the fourth Monday, the 26th day, of September, 1881.

Present: Justices James, Cox, and Hagner.

FRIDAY, *January, 6th,* 1881.

Session resumed pursuant to adjournment.

Present: Chief Justice Cartter, and Justices Hagner and James.

JOHN W. THOMPSON, Pl'ff,
vs.
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709. Cal. 96.

Argued by Mr. Morris, for the plaintiff, and by A. C. Bradley, for the defendant, without concluding.

51 MONDAY, *January 9th,* 1881.

Session resumed pursuant to adjournment.

Present: Chief Justice Cartter, and Justices Hagner and James.

JOHN W. THOMPSON, Pl'ff,
vs
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709. Cal. 96.

Mr. Bradley resumes his argument, and concludes at 2 p. m., argument to be resumed to-morrow.

TUESDAY, *January 10th*, 1881.

Session resumed pursuant to adjournment.
Present: Chief Justice Cartter, and Justices Hagner and James.

JOHN W. THOMPSON, Pl'ff,
vs.
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709. Cal. 96.

Argument resumed by Mr. Mattingly, for defendant, Mr. Merrick, for plaintiff, and submitted.

WEDNESDAY, *January 18th*, 1882.

Session resumed pursuant to adjournment.
Present: Chief Justice Cartter, and Justices Hagner and James.

52 JOHN W. THOMPSON, Pl'ff,
vs.
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709. Cal. 96.

Now come here the parties, by their respective attorneys, whereupon, because it appears to the court here that there is error in the record and proceedings and in the judgment of the special term at law, therefore it is considered that the said judgment be, and the same is hereby, reversed, and the court remands the cause to the special term to be tried anew, according to the opinion of this court.

Second Trial.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing on the fourth Monday, it being the 22nd day, of January, A. D. 1883.

MONDAY, *January 22nd, A. D.* 1883.

By order of Arthur MacArthur, justice, one of the justices of said supreme court, presiding, the court is opened by proclama-
53 tion of the marshal, pursuant to rule of court.

TUESDAY, *February 6th, A. D.* 1883.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

JOHN W. THOMPSON, Pl'ff,
vs.
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709. Cal. 64.

Now comes here as well the plaintiff, by his attorneys, Messrs. Merrick and Morris, as the defendant, by his attorneys, Messrs. Mattingly & Bradley, and a jury of good and lawful men of this District, to wit, Henry Iseman, James McDermott, George H. Trunnell, George H. Boston, Caspar Knessi, Benjamin Charlton, William C. Duvall, Melville Shuster, Charles Crummell, James M. Foster, R. Carter Ballantyne, and Charles B. Bailey, who, being duly sworn

to try the issue above joined, after hearing a part of the evidence in the case, are respited until the meeting of the court to-morrow morning.

WEDNESDAY, *February 7th, A. D.* 1883.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

54 JOHN W. THOMPSON, Pl'ff, *vs.* ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709. Cal. 64.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find said issues in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises is the sum of eleven thousand four hundred and forty-two dollars and eighty-four cents, with interest on $8,000, part thereof, at the rate of eight per cent. per annum from March 10th, 1875, to March 10th, 1876, and thereafter at 6 % until paid, and on $3,442.84, balance thereof, at six per cent. from June 30th, 1881, until paid, besides costs. Therefore it is considered that the plaintiff recover against said defendant eleven thousand four hundred and forty-two dollars and eighty-four cents, with interest as aforesaid, being the money payable by him to the plaintiff by reason of the premises, and $55.85 for his costs of suit, and have execution thereof.

SATURDAY, *February 10th, A. D.* 1883.

55 Session resumed pursuant to adjournment, MacArthur, justice, presiding.

JOHN W. THOMPSON, Pl'ff, *vs.* ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709.

And now comes into court said defendant, by Wm. F. Mattingly and A. C. Bradley, his attorneys, and moves the court for a new trial in this action, because, 1st, the verdict as entered is not the verdict which was returned by the jury; 2nd, the verdict as entered is contrary to the evidence; 3rd, the verdict rendered by the jury is void for uncertainty in support of this motion. Defendant refers to the affidavit on file of said attorneys relating to said verdict. Defendant also moves the court for a new trial on bill of exceptions.

Affidavit in Support of New Trial.

In the Supreme Court of the District of Columbia.

JOHN W. THOMPSON *vs.* ALEXANDER R. SHEPHERD. } At Law. No. 21709.

56 William F. Mattingly and Andrew C. Bradley, upon oath, say that, as attorneys for the defendant in this action, they

took part in the trial of the same, on the 6th and 7th days of February, 1883; that on the last-named day, on the jury coming into court to return their verdict, in response to the usual question by the clerk, "How do you find?" the foreman responded, "We find for the plaintiff for the amount due upon the notes, with interest thereon at six per cent. from maturity;" and immediately thereupon the jury was discharged and left the room.

WM. F. MATTINGLY.
A. C. BRADLEY.

Subscribed and sworn to before me this 9th day of February, 1883.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clk.*

SATURDAY, *March 10th, A. D.* 1883.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

57 JOHN W. THOMPSON, Pl'ff, *vs.* ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709.

Upon hearing the defendant's motion for a new trial addressed to discretion of the court it is considered that said motion be, and the same is hereby, overruled.

Appeal prayed by defendant.

And thereupon the defendant, by his said attorneys, tenders to the court here his bills of exceptions to the rulings of the court on the trial of this case, and prays that they may be duly signed, sealed, and made a part of the record, which is done accordingly.

Bills of Exceptions to Second Trial. Filed March 10th, 1883.

In the Supreme Court of the District of Columbia.

JOHN W. THOMPSON, *vs.* ALEXANDER R. SHEPHERD } At Law. No. 21709.

First exception.

1. Be it known that at the trial of this cause the plaintiff, to maintain the issues on his part joined, offered in evidence the
58 promissory notes in words and figures following, the execution thereof by the defendant having been admitted:

$7,000. WASHINGTON, D. C., *March 10th,* 1873.

Two years after date I promise to pay to the order of John W. Thompson seven thousand dollars, value received, with interest at the rate of eight per centum per annum, payable semi-annually.

(Signed) ALEX. R. SHEPHERD.

$8,000. WASHINGTON, D. C., *March* 10, 1873.

Three years after date I promise to pay to the order of John W. Thompson eight thousand dollars, value received, with interest at the rate of eight per centum per annum, payable semi-annually.

(Signed) ALEX. R. SHEPHERD.

And the plaintiff admitted that the last two credits upon the $7,000 note were credits paid by purchasers of portions of the property embraced in the deed of trust given to secure the payment of said notes to obtain releases from said deed.

The plaintiff thereupon proposed to offer evidence tending to prove a new promise by the defendant to pay the notes sued on
59 within three years before this suit was brought, and the defendant objected to any evidence tending to prove a new promise under the issue in the cause made by the general replication to the plea of the statute as inadmissible, but the court overruled the said objection and ruled that evidence for that purpose was admissible under the pleadings; to which the defendant then and there excepted, and prayed the court to sign and seal this his first bill of exceptions, which is accordingly done this 7th day of February, 1883.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Second Exception.

2. And thereupon the evidence contained in the first bill of exceptions, being made part of this second bill of exceptions, the defendant insisting upon his said objection, the plaintiff offered in evidence the record of the deed of trust from the defendant to William Thompson, recorded in the land records for the District of Columbia, in liber No. 712, folio 328.

This indenture, made this tenth day of March, in the year of our Lord one thousand eight hundred and seventy-three, between Alexander R. Shepherd and Mary G. Shepherd, his wife, of the
60 city of Washington, in the District of Columbia, of the first part, and William Thompson, of the same place, of the second part:

Whereas the said Alexander R. Shepherd is justly indebted unto John W. Thompson in the sum of twenty-two thousand dollars (being the balance of purchase-money due on the hereinafter-described lots of ground), for which amount he, the said Alexander R. Shepherd, hass passed his three promissory notes, bearing even date with these presents and payable to the order of the said John W. Thompson, two of the said notes being for the sum of seven thousand dollars each and payable, respectively, in one and two years after date, and the third of said notes being for the sum of eight thousand dollars and payable in three years after date—all of said notes bearing interest at the rate of eight per cent. per annum, interest payable semi-annually; and to secure the punctual payment of said notes and interest and costs the parties of the first part execute these presents:

Now, therefore, this indenture witnesseth: That the said parties of the first part, for and in consideration of the premises aforesaid and, further, the sum of one dollar, in lawful money of the United States, * * * have granted, bargained, sold, * * * and do by these presents grant, bargain, and sell, * * * unto the said party of the second part, his heirs and assigns, all those pieces or parcels of ground being and situate in the city of Washington, in the District of Columbia, and known and described as original lot numbered six (6), in square numbered one hundred and sixty-four (164), and lots lettered C, D, G, K, L, M, N, P, and Q, in Harris and Grammer's recorded subdivision of part of said square numbered one hundred and sixty-four (164), together with the improvements; to have and to hold the said described real estate and premises and appurtenances unto and to the use of the said party of the second part, his heirs and assigns—

61

In and upon the trusts, nevertheless * * * (Here follow the trusts usually contained in a deed of trust.) * * *

In testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

(Signed) ALEX. R. SHEPHERD. [SEAL.]
MARY G. SHEPHERD. [SEAL.]

62 Duly witnessed and acknowledged.

Indorsement: Received for record on the 13th day of March, A. D. 1873, and recorded in liber No. 712, folio 128, one of the land records for the District of Columbia, and examined by (signed) S. Wolfe, recorder.

And the plaintiff, then being shown the paper writing of June 21st, 1877, afterwards offered in evidence and contained in this record, and being interrogated by his counsel as to the circumstances under which it was executed, testified that he was pressing for a settlement of his claim; that he did not know whether the property was advertised for sale under the deed of trust or not, but he had threatened to advertise, and after some negotiations for several weeks, and passing back and forth between himself and the defendant, the paper was given for the purpose of paying the defendant's debt to him; that he had no personal intercourse with the defendant in relation to the matter, and it was conducted by the intervention of third parties.

The plaintiff then offered in evidence, as containing an acknowledgment of the indebtedness from which the law would imply a promise to pay, the execution thereof by the respective parties being admitted, the paper writing in words and figures following, to wit:

63

In consideration of the indebtedness described in the deed of trust to William Thompson, trustee, executed March 10th, 1873, and recorded in liber No. 712, folio 128, of the land records of the District of Columbia, the demand and claim of A. C. Bradley to the use of A. R. Shepherd and others against the United States for the use

and occupation of the premises No. 915 E St. northwest, and all the proceeds thereof and the moneys derived therefrom, are hereby pledged and made applicable to the payment of said indebtedness, with interest thereon at the rate of eight per cent. per annum until paid. And it is hereby covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be indorsed and delivered to the trustee- named in said trust, and the proceeds thereof, less all proper costs and charges, be applied to the payment of the said indebtedness, with interest as aforesaid, or to so
64 much thereof as the sum or sums of money so received is or are sufficient to pay.

Witness our hands this 21st day of June, 1877.

(Signed) A. C. BRADLEY.
ALEX. R. SHEPHERD.

The undersigned trustees hereby consent and concur in the above assignment.

(Signed) GEO. TAYLOR, *Trustee.*
SAM. CROSS, *Trustee.*
PETER F. BACON, *Trustee.*

To the admission of which instrument in evidence the defendant thereupon objected:

1st. That it was inadmissible under the form of the issue.

2. That there is a variance between the new promise alleged to be evidenced by said assignment and the declaration.

3. That the assignment does not contain such an acknowledgment as the law would imply therefrom a new promise.

4. That under the law the paper is absolutely null and void and not competent evidence for any purpose. And the court overruled the said objections and admitted the paper in evidence; to which overruling and admission the defendant then and there excepted and prayed the court to sign and seal this his second bill of
65 exceptions, which is accordingly done this 7th day of February, 1883.

ARTHUR MacARTHUR, *Justice.* [SEAL.]

Third Exception.

And thereupon the evidence contained in the foregoing bills of exception being made part of this third bill of exceptions, the plaintiff further, to maintain the issues on his part joined, offered in evidence the record of the deed of assignment by the defendant to his trustees, dated November 15th, 1876:

This indenture, made this 15th day of November, in the year eighteen hundred and seventy-six (1876), by and betwe-n Alexander R. Shepherd and Mary G. Shepherd, his wife, of the city of Washington, District of Columbia, of the first part, and George Taylor, Henry A. Willard, and Samuel Cross, of the second part.

Whereas the said Alexander R. Shepherd is indebted to divers persons in divers sums of money, and is desirous to secure the payment

thereof by a conveyance of his property and effects for that purpose; and whereas his unsecured debts, so far as the same are known to him at this time, amount to about the sum of three hundred
66 and ten thousand dollars ($310,000); and whereas, in order that his unsecured creditors may have their evidence of indebtedness in a marketable shape and for the purposes of this trust, he has executed his certain promissory notes bearing even date with these presents, each for the sum of one hundred dollars ($100), and payable five years after date, with interest coupons attached at the rate of six per cent., payable semi-annually after the expiration of the first year, said notes being equal in amount to the amount of his unsecured indebtness, be the same more or less than said sum of $310,000, and being payable solely out of the proceeds of the property included in and conveyed by these presents; and whereas the said parties of the first part are desirous to secure the payment of said notes and coupons when and as the same shall become due and payable, they therefore execute these presents.

Now, therefore, this indenture witnesseth:

That the said parties of the first part, for and in consideration of the premises and the sum of five dollars, * * * have granted, bargained, and sold, conveyed, assigned, transferred, and set over, and by these presents do grant, bargain, and sell, convey,
67 assign, transfer, and set over, unto the said parties of the second part and the survivors and survivor of them, his heirs, executors, administrators, and assigns, all and singular the lands, tenements, hereditaments, and appurtenances, stocks, promissory notes, debts, choses in action, claims, demands, property, and effects of every description, fully and particularly enumerated and described in a schedule thereof, hereto annexed, marked "Schedule A," the same being and intended to be all the property and estate of every kind whatsoever of him, the said Alexander R. Shepherd, except his interest in the assets of A. R. Shepherd & Co.:

To have and to hold in trust, nevertheless, to and for the use and purpose following, to wit:

In trust to suffer and permit the said Alexander R. Shepherd to remain in the possession and receive the rents and profits thereof until default be made in the payment of said promissory notes or any of said interest coupons, and upon the full payment
68 of said promissory notes, &c., &c., to release and reconvey all and singular the property aforesaid, or so much thereof as may be undisposed of, unto the said Alexander R. Shepherd, his heirs, executors, administrators, or assigns.

But should default be made * * * (the trustees are to take possession, sell, and dispose of the property, and pay the debts).

And upon this further trust, to make all conveyances and transfers of said property or any portion thereof as they may be required to make by the said Alexander R. Shepherd for the purpose of perfecting and carrying out any settlement, sale, or exchange which the said Shepherd may make for the benefit of the creditors secured hereby. * * * Said creditors are specified in Schedule B, hereto annexed. * * * And the said Alexander R. Shepherd doth

hereby covenant * * * that all the property conveyed by these presents, and all the rents, issues, profits, and proceeds thereof which shall come into his hands shall be used, managed, and applied by him solely for the interest, benefit, and advantage of the holders of the notes aforesaid, &c., &c. * * *

In testimony whereof, &c., &c.

(Signed) ALEX. R. SHEPHERD. [SEAL.]
(Signed) MARY G. SHEPHERD. [SEAL.]

69 Witness:
D. R. BELL.

We do hereby accept the foregoing trust.
(Signed) GEO. TAYLOR.
SAM. CROSS.

Witness:
D. R. BELL.

(Here follows acknowledgement in due form.)

Schedule Assets A. Unincumbered.

* * * * * * *

Court of Claims on E-street property ($6,000).

* * * * * * *

Schedule B. Schedule of creditors.

* * * * * * *

J. W. Thompson.

(The defendant insisting upon his general objection), and also testified that he had received nothing from said assignment; that the matter was in litigation; that he had released a great deal of property which constituted his security under the deed of trust—had released from time to time at the defendant's request.

And upon cross-examination he testified that his relations with the defendant had not been friendly since defendant's failure
70 and assignment in November, 1876; that he had had no incourse with him; that he knew of his failure and of said assignment at the time; that he was sick at the time and had not signed it; that the assignment of June 21st, 1877, covered three years' rent of the property mentioned in it, at $4,200 per annum; that all the property which had been embraced in the trust to secure the notes has been released except one lot and parts of two others, and these he had since been advised he could not hold under the trust because of his having released other property which under the law would have been first liable; that he had executed no release since some time before June, 1877, except one piece to the purchaser, who had paid the $1,200 credited on the $7,000 note; that the defendant had made a proposition, through William Thompson, the trustee named in the deed of trust and plaintiff's brother, some time before that to settle said indebtedness by conveying a piece of

real estate, but it had been declined, deeming the value put upon it by the defendant to- high.

The plaintiff then rested.

71 And thereupon the defendant, to maintain the issues on his part joined, the plaintiff having waived all objection for scandal and impertinence, and all formal objections thereto, offered in evidence the deposition of the defendant as follows:

In November, 1876, I suspended payment, and, to secure my creditors, made a deed of trust of all my property, except my interest in the firm of A. R. Shepherd & Co., and from that time I was engaged in the settlement of my estate. By the 21st day of June, 1877, I had been able to effect many settlements by the transfer of property, realizing the magnanimous course pursued by every creditor except the plaintiff. My relations with the plaintiff then were unfriendly; they are now.

The circumstances attending the execution of Exhibit A (assignment of June 21st) are as follows:

A short time previous to the execution of that paper Mr. N. Wilson called on me, as attorney for plaintiff, relative to a debt claimed to be due by me for certain lots in square between K and L and Connecticut avenue and 17th streets, in the city of Washington.

(Mr. Wilson was also my attorney for the collection of certain
72 sums due me by the Post Office Department for rent of house 915 E street northwest.) Mr. Wilson suggested that a transfer of the rent of this house would satisfy the plaintiff, and after some conversation I agreed to it, stipulating that the plaintiff should at once release a small strip of land on which the house of Mr. George S. Gideon stood. This the plaintiff agreed to do, through his attorney, Mr. Wilson, but did not do it.

The notes referred to were not shown to me, and I signed the paper (assignment) upon the declaration of Mr. Wilson that it was in exact accordance with the notes. I had no knowledge whatever of any change in the nature of the notes or debt, and the perpetration of the same was a fraud and in direct violation of what I agreed to do. I had no knowledge that by signing it I was agreeing to pay eight per cent. after maturity instead of six. I would not have done it under any circumstances, as I could not have changed legally the obligation under my trust given to secure my creditors. I regarded it merely as settling a claim on one piece of property with the rent of another, both being under the same trust. It was not my intention to change the notes or debt in any particular, and the
73 wording of the paper was therefore a fraud and imposition.

I signed it under the belief that the notes bore interest at eight per cent. until paid, and I had no idea that I was agreeing to pay a rate of interest not expressed in the notes. The paper was presented by Mr. Wilson, and, when signed, was given to him. The plaintiff had full knowledge at the time of my pecuniary embarrassment, and of my efforts towards and mode of settlement with my creditors. My object in executing the paper was to settle the indebtedness on the property by the transfer of the claim for rent due upon

other property. I have made no promise to the plaintiff, or any agent or attorney, or to any person acting in his interest or behalf, or to any one for his benefit, within three years prior to March 17th, 1880, to pay the notes sued on in this action.

And it was agreed that the occasion of the execution of said assignment of June 21st, 1877, by A. C. Bradley, and by Taylor, Cross, and Bacon was that the title to the premises described therein had been in said Bradley, who had leased the same to the Post Office Department and had subsequently conveyed the same to the defendant and assigned to him the lease, and the defendant having
74 conveyed the property to said trustees, Taylor, Cross, and Bacon, the claim against the United States was filed as described in said assignment, and said assignment was executed by said Bradley as a mere formal party.

The defendant then rested.

Thereupon the plaintiff, further to maintain the issues on his part joined, offered in rebuttal by Nathaniel Wilson as a witness evidence tending to prove that he was acting as attorney for the defendant in prosecuting the claim mentioned in the assignment against the United States; that he was not attorney for the plaintiff, and that the defendant said that the plaintiff was pressing the advertisement of the property under the deed of trust, and wanted him to see the plaintiff and ascertain if he couldn't fix it with other security; that he saw the plaintiff and he prepared this assignment, though it is not in his handwriting; that he had no recollection of having the deed of trust or the notes before him or of seeing them; that he did not tell the defendant that the assignment contained an exact description of the notes; that nothing at all was said
75 about the rate of interest, and no assertion made as to the notes; that it was thought that the assignment was in accordance with the notes.

And thereupon the plaintiff offered no other evidence and rested.

Whereupon the defendant requested the court to instruct the jury as follows:

1st. When the statute of limitations is relied on as a defence, and there is no new express promise to pay the note sued on, but the plaintiff relies upon the promise implied by law from the acknowledgment of the defendant, then such acknowledgment must contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay, and which authorizes the presumption of a promise or intention to pay; but if there be accompanying circumstances which repel the presumption of a promise or intention to pay, then such circumstances are to be taken into consideration by the jury in connection with the acknowledgment by the defendant, and if the jury believe that the circumstances accompanying the acknowledgment of the defendant, relied upon by the plaintiff in this case, repel the presumption of a promise
76 or intention on the part of the defendant, Shepherd, to pay the notes in suit otherwise than by the property assigned, then the plaintiff is not entitled to recover.

3. If the jury believe from the evidence that the defendant proposed to make said assignment of the rents of the E-street property in consideration that the property secured by said deed of trust to William Thompson should not be sold at public auction thereunder, and that said proposition had reference solely to the liability of the property for the indebtedness secured by said deed of trust, and not to his personal liability; that it was made to save said property from sacrifice at private sale, then said proposition is not to be regarded by the jury as a new promise by the defendant, sufficient to take the case out of the bar of the statute of limitations.

4. The jury, in connection with the assignment of the rents of the E-street property in evidence, are to take into consideration all of the accompanying circumstances in evidence, and if from such circumstances they believe that the purpose for which said assignment was made was merely to apply what might be realized there-
77 from to the liquidation of the notes in suit, then the plaintiff is not entitled to recover.

5. The jury, in connection with the assignment of the rents of the E-street property in evidence, are to take into consideration all of the accompanying circumstances in evidence, and if from such circumstances they believe that in and by said assignment the defendant only intended to express a willingness to pay the notes in suit out of the property so assigned, then said assignment is not sufficient to take the case out of the statute of limitations, and the plaintiff is not entitled to recover.

Each of which was refused by the court, and to such refusal as to each of said prayers the defendant then and there severally excepted, and prayed the court to sign and seal this his third bill of exceptions, which is accordingly done this 7th day of February, 1883.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Fourth Exception.

The evidence obtained in the foregoing bills of exception being made part of this fourth bill of exceptions the plaintiff thereupon prayed the court to instruct the jury as follows:

78 1. The plaintiff requests the court to instruct the jury that if they find from the evidence that the defendant, on the 21st day of June, A. D. 1877, executed the instrument of writing, which has been offered in evidence and which is in the following words—

In consideration of the indebtedness described in the deed of trust to William Thompson, trustee, executed March 10th, 1873, and recorded in liber No. 712, folio 128, of the land records of the District of Columbia, the demand and claim of A. C. Bradley to the use of A. R. Shepherd and others against the United States for the use and occupation of the premises No. 915 E street northwest, and all the proceeds thereof and the moneys derived therefrom are hereby pledged and made applicable to the payment of said indebtedness, with interest thereon at the rate of eight per cent. per annum until paid; and it is hereby covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be in-

dorsed and delivered to the trustee named in said trust, and the proceeds thereof, less all proper costs and charges, be applied to the payment of the said indebtedness, with interest as aforesaid,
79 or to so much thereof as the sum or sums of money so received is or are suffieient to pay.

Witness our hands this 21st day of June, 1877.

(Signed) A. C. BRADLEY.
ALEX. R. SHEPHERD.

The undersigned trustees hereby consent and concur in the above assignment.

(Signed) GEO. TAYLOR, *Trustee.*
SAM. CROSS, *Trustee.*
PETER F. BACON, *Trustee*—

such instrument of writing is evidence of a new promise within the period of limitations before the institution of this suit to pay the indebtedness in suit in this cause.

2. The plaintiff requests the court to instruct the jury that if they find from the evidence that the defendant, on the 21st day of June, A. D. 1877, executed the instrument of writing which has been offered in evidence in this cause and which is in the following words, to wit—

In consideration of indebtedness described in the deed of trust to William Thompson, trustee, executed March 10th, 1873, and recorded in liber No. 712, folio 128, of the land records of the District
80 of Columbia, the demand and claim of A. C. Bradley to the use of A. R. Shepherd and others against the United States for the use and occupation of the premises No. 915 E street, northwest, and all the proceeds thereof and the moneys derived therefrom are hereby pledged and made applicable to the payment of said indebtedness, with interest thereon at the rate of eight per cent. per annum until paid; and it is hereby covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be indorsed and delivered to the trustee named in said trust, and the proceeds thereof, less all proper costs and charges, be applied to the payment of the said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay.

Witness our hands this 21st day of June, 1877.

(Signed) A. C. BRADLEY.
ALEX. R. SHEPHERD.

The undersigned trustees hereby consent and concur in the above assignment.

(Signed) GEO. TAYLOR, *Trustee.*
SAM. CROSS, *Trustee.*
PETER F. BACON, *Trustee*—

81 such instrument of writing is evidence that the defendant, within the period of three years before the institution of the

suit, made a new promise to pay the indebtedness which has been here sued on, and that it is wholly immaterial to the issues in this cause whether the words "until paid," which occur in said instrument of writing, were placed there by mistake.

3. The plaintiff requests the court to instruct the jury that if they find from the evidence that the defendant, on the 21st day of June, A. D. 1877, executed the instrument of writing which has been offered in evidence in this cause, and which is in the following words, to wit—

In consideration of the indebtedness described in the deed of trust to William Thompson, trustee, executed March 10th, 1873, and recorded in liber No. 712, folio 128, of the land records of the District of Columbia, the demand and claim of A. C. Bradley, to the use of A. R. Shepherd and others, against the United States for the use and occupation of the premises No. 915 E St., northwest, and all
82 the proceeds thereof and the moneys derived therefrom, are hereby pledged and made applicable to the payment of said indebtedness, with interest thereon at the rate of eight per cent. per annum until paid; and it is hereby covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be indorsed and delivered to the trustee named in said trust, and the proceeds thereof, less all proper costs and charges, be applied to the payment of said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay.

Witness our hands this 21st day of June, 1877.

(Signed) A. C. BRADLEY.
ALEX. R. SHEPHERD.

The undersigned trustees hereby consent and concur in the above assignment.

GEO. TAYLOR, *Trustee.*
SAM. CROSS, *Trustee.*
PETER F. BACON, *Trustee.*—

such instrument of writing is evidence of a new promise made by the defendant within the period of three years before the in-
83 stitution of the suit to pay the indebtedness sued upon, notwithstanding that the rate of interest therein agreed to be paid by the defendant may have been agreed upon by him in ignorance of the rate specified in the notes themselves.

To which the defendant then and there objected, but the court overruled said objection and granted each of said instructions; to which granting by the court the defendant then and there severally excepted as to each of said instructions and prayed the court to sign and seal this his fourth bill of exceptions, which is accordingly done this 7th day of February, 1883.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Fifth Exception.

The evidence contained in the foregoing bills of exception being made part of this fifth bill of exceptions the court thereupon proceeded to charge the jury as follows:

Charge.

The court, after some general instructions as to the defense of the statute of limitations and as to new promises, proceeded to
84 state that the defendant claimed that the assignment, which was the only evidence of a new promise in the case, was given upon condition that the plaintiff should release certain property from the deed of trust to Wm. Thompson, and that he had failed to do so, and then said: The question here is whether the defendant has established the condition of such a condition.

There is a conflict of testimony here between two very eminent gentlemen. It will be for you to settle that matter. If you come to the conclusion that this promise was accompanied by conditions which were not fulfilled the defendant would be entitled to a verdict, because when a party chooses to revive an indebtedness which could not be enforced at law he can do it upon such terms and conditions as he pleases. He is then the master of the situation. He can refuse to make any such promise or he can accompany it with such terms as his circumstances or convenience or pleasure may dictate to him, and when it is of this conditional character the suit is no more maintainable than it would be without any prom-
85 ise whatever, unless the conditions have been complied with.

[If you come to a conclusion, upon the whole testimony, and decide this question in favor of the plaintiff, you will disregard the defence entirely and return a verdict for the plaintiff.]

[Now, the construction which the supreme court put upon this instrument of June, 1877, is to the effect that it was admissible in evidence, as I interpret it, upon its face, as sufficient to establish the fact of a new promise. They refer to circumstances which might modify this meaning of the contract. I am of the opinion here that there is no sufficient testimony of circumstances to have that effect. I think, therefore, I ought to instruct you, as a matter of law in the case, that in the present attitude the paper of June, 1877 (if that was the date), is evidence of a new promise.]

[So that the only question for you to pass upon, really, is whether it was attended by the condition which has been insisted upon here and whether that condition has been complied with.]

And to so much of said charges as is embraced in brackets,
86 as to each of said portions, the defendant then and there severally excepted before the jury retired, and prayed the court to sign and seal this his fifth bill of exceptions, which is accordingly done this 7th day of February, 1883.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

Sixth Exception.

And thereupon the jury retired to their room and subsequently returned and brought in the following verdict:

"We find for the plaintiff for the amount due on the notes, with interest at six per cent. from maturity."

And immediately thereupon the jury was discharged and left the room; whereupon, the clerk being engaged in entering the verdict for an amount in accordance with a memorandum handed him by the plaintiff's attorney, the attorney for the defendant moved the court to instruct the clerk to enter said verdict as the same was rendered by the jury, but the court refused to permit said verdict to be recorded as the same was rendered, and instructed the clerk to ascertain the amount due upon each note and to enter the verdict
87 in accordance therewith, and thereupon the clerk entered the same as follows:

As embodied in the entry of judgment, "who * * * on their oath say they find said issues in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises is the sum of eleven thousand four hundred and forty-two dollars and eighty-four cents, with interest on $8,000, part thereof at the rate of eight per cent. per annum from March 10th, 1875, to March 10th, 1876, and thereafter at 6 per cent. until paid, and on $3,442.84, balance thereof, at six per cent. from June 30th, 1881, until paid, besides costs."

To which acts of the court in refusing to permit said verdict to be recorded as rendered, and in directing the clerk to ascertain the amounts due and enter a verdict in accordance therewith, the defendant, as to each, then and there excepted, and prayed the court to sign and seal this his sixth bill of exceptions, which is accordingly done this 7th day of February, 1883.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

88 Thereupon, on February 10th, 1883, the defendant moved for a new trial upon the ground that the verdict as entered was not the verdict which was returned by the jury, and, in support of the motion, referred to the following affidavit:

William F. Mattingly and Andrew C. Bradley upon oath say that as attorneys for the defendant in this action they took part in the trial of the same on the 6th and 7th days of February, 1883; that on the last-named day, on the jury coming into court to return their verdict, in response to the usual question by the clerk, "How do you find," the foreman responded, "We find for the plaintiff for the amount due upon the notes, with interest thereon at six per cent. from maturity," and immediately thereupon the jury was discharged and left the room.

March 10th, 1883.—Motion for new trial overruled and appeal taken to general term.

Second Trial.

Proceedings before the supreme court of the District of Columbia, in general term, commencing the first Monday, being the
89 first day, of October, A. D. 1883.

Present: Chief Justice Cartter, and Justices Hagner and Cox.

TUESDAY, *January 15th, A. D.* 1884.

Session resumed pursuant to adjournment.

Present: Chief Justice Cartter, and Justices Hagner and Cox.

JOHN W. THOMPSON, Pl'ff,
vs.
ALEXANDER R. SHEPHERD, Def't. } At Law. No. 21709. Cal. 49.

Now come here again the plaintiff and defendant, by their respective attorneys, and thereupon, because it appears to the court here that there is no error, either in the record and proceedings or in the judgment of the special term, therefore it is considered that the said judgment be, and the same is, affirmed, with costs, to be taxed by the clerk, and that the plaintiff have execution thereof.

90 Filed Feb. 8, 1884. R. J. Meigs, clerk.

In the Supreme Court of the District of Columbia, the 8th day of February, 1884.

JOHN W. THOMPSON
vs.
ALEXANDER R. SHEPHERD. } No. 21709.

In error.

Know all men by these presents that we, Alexander R. Shepherd and Joseph T. Stevens, are bound unto the above-named John W. Thompson in the sum of two hundred dollars, to be paid to the said John W. Thompson, his *his* executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 8th day of February, 1884.

Whereas the above-named Alexander R. Shepherd has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Alexander R. Shepherd shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the sum shall be and remain in full force and virtue.

ALEXANDER R. SHEPHERD, [SEAL.]
By W. F. MATTINGLY &
A. C. BRADLEY,
His Att'ys-in-Fact.
JOSEPH T. STEVENS. [SEAL.]

Sealed and delivered in the presence of—

—— ——.

Approved Feb. 8th, 1884.

D. K. CARTTER,
Ch'f Justice.

91 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between John W. Thompson, plaintiff, and Alexander R. Shepherd, defendant, being No. 21709 at law, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 8th day of February, in the year of our Lord 1884, and of the Independence of the United States the one hundred and eighth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To John W. Thompson:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Alexander R. Shepherd is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Chief Justice.

Service acknowledge- this 8th day of Feb'y, A. D. 1884.

MERRICK & MORRIS,
Attorneys for Plaintiff.

92 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 8th day of March, 1884.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 8th day of March, 1884.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 8th day of March, 1884.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Assistant Clerk.

Endorsed on cover: District of Columbia, Supreme Court. No. 264. Alexander R. Shepherd, plaintiff in error, *vs.* John W. Thompson. Filed 14th July, 1884.

122.231

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 264.

ALEXANDER R. SHEPHERD, PLAINTIFF IN ERROR,

vs.

JOHN W. THOMPSON.

BRIEF FOR PLAINTIFF IN ERROR.

A. C. BRADLEY,
WM. F. MATTINGLY,
Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

92 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 8th day of March, 1884.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 8th day of March, 1884.

D. K. CARTTER, [SEAL.]
Chief Justice.

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vs.

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ASSIGNMENT OF ERRORS.

The court erred in admitting in evidence the assignment of June 21, 1877.

The court erred in refusing the instructions prayed by the defendant below and each of them.

The court erred in granting each of the several instructions granted to the plaintiff below.

The court erred in taking from the jury the consideration of all questions except the question whether the assignment was coupled with a condition, and whether that condition had been performed.

The court erred in not submitting to the jury the question of new promise from all the circumstances in evidence.

The court erred in not having the verdict recorded as rendered, in having the verdict amended by the clerk after the discharge of the jury, and in entering judgment upon such verdict.

BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff in error was sued below as the maker of two promissory notes, each dated March 10, 1873, one for $7,000, the other for $8,000, payable to the order of the defendant in error, with interest at 8 per cent. per annum, payable, respectively, two years and three years after date.

The declaration contained a special count on each note and [the combined money counts, with the particulars of demand, consisting of copies of the two notes, and claimed $15,000, the aggregate amount of the face of the notes. To each count the plea of limitations (*actio non accrevit*) was interposed, upon which the plaintiff below joined issue.

The cause was first tried in April, 1881, and resulted in a verdict for the defendant. This verdict was set aside and a new trial granted by the court in general term, and upon the second trial, in February, 1883, a verdict and judgment were rendered for the plaintiff below, which the court in general term affirmed, and from the judgment this writ of error is prosecuted.

The plaintiff below, for the purpose of removing the bar of the statute, and as evidence of a new promise within three years before suit brought, offered the following instrument:

"In consideration of the indebtedness described in the deed of trust to William Thompson, trustee, executed March 10, 1873, and recorded in liber No. 712, folio 128, of the land records of the District of Columbia, the demand and claim of A. C. Bradley to the use of A. R. Shepherd and others against the United States for the use and occupation of the premises No. 915 E street northwest, and all the proceeds thereof and the moneys derived therefrom, are hereby pledged and made applicable to the payment of said indebtedness,

with interest thereon at the rate of 8 per cent. per annum until paid. And it is hereby covenanted and agreed that any draft or check issued in payment or part payment of said claim shall be endorsed and delivered to the trustee named in said trust, and the proceeds thereof, less all proper costs and charges, be applied to the payment of said indebtedness, with interest as aforesaid, or to so much thereof as the sum or sums of money so received is or are sufficient to pay.

"Witness our hands this 21st day of June, 1877.

"(Signed) A. C. BRADLEY.
"ALEX. R. SHEPHERD.

"The undersigned trustees hereby consent and concur in the above assignment.

"(Signed) GEO. TAYLOR, *Trustee.*
"SAM. CROSS, *Trustee.*
"PETER F. BACON, *Trustee.*"

This instrument was amplified by evidence of the deed of trust referred to in it, by which Shepherd conveyed certain real estate to secure the payment of $22,000, balance of the purchase-money, manifested by three promissory notes, two of which are the notes in suit, whilst the third was of the same date, for $7,000, and payable in one year. It was further amplified by evidence of a deed of trust from Shepherd to the trustees, Taylor, Cross, and Bacon, for the benefit of his unsecured creditors, in which was included this claim against the United States, and in which the plaintiff below was named as one of the creditors, the trust being made to secure the payment of certain promissory notes *payable solely out of the property conveyed*, and among the trusts, to make all conveyances and transfers for the purpose of carrying out any settlement, sale, or exchange which Shepherd might make for the benefit of the creditors secured thereby.

The notes in suit had been proved, and several large credits upon the $7,000 note had been established.

Evidence had also been given by the plaintiff that threats had been made to advertise the property under his deed of trust and that the paper was given for the purpose of paying Shepherd's debt to him; that he had no personal intercourse with Shepherd in the matter, and the transaction was conducted by the intervention of third parties.

The defendant Shepherd testified that when the paper was executed a condition was attached to it which had never been performed; that nothing was said about changing the rate of interest on the notes to 8 per cent. after maturity, and that such was not the purpose of the assignment; that his object in executing the paper was to settle the indebtedness on the property by the transfer of the claim for rent due upon other property, both being under the same trust; that he made no promise to the plaintiff, or to any person in his behalf, to pay the notes in suit within three years before suit.

The court admitted this assignment in evidence, and instructed the jury that upon its face it was sufficient to establish the fact of a new promise, and the only question for them to pass upon was whether it was attended by a condition, and whether that condition had been complied with. He rejected all of the defendant's prayers and granted all of the plaintiff's prayers. Exceptions were duly taken by the defendant.

The jury returned a verdict "for the amount due on the notes, with interest at 6 per cent. from maturity," and the clerk, by the direction of the court, after the discharge of the jury, computed the amount from the evidence, amended the verdict, and entered judgment accordingly, to which exception was taken.

POINTS.

I.

The court erred in admitting the assignment in evidence—

a. Because the instrument is a specific assignment of a claim against the United States to a creditor, and in no respect an assignment by operation of law. The assignee claiming the benefit of it is neither an assignee in bankruptcy nor the general assignee of an insolvent.

Spofford *vs.* Kirk, 97 U. S., 484.
Goodman *vs.* Niblack, 102 *Id.*, 556.
St. Paul R. R. *vs.* U. S., 112 U. S., 733.
Bailey *vs.* U. S., 109 U. S., 432.

The statute declares such an assignment to be "absolutely null and void." It has no force; it is utterly, absolutely ineffectual; it is as if no assignment had been made. The admission contained in the instrument derives its vitality, if any it has, from the instrument. It has no independent, separate existence. If there is a legal assignment or instrument there may be a binding admission contained in it, but if this instrument is stripped of its quality of assignment, the quality which the law pronounces "absolutely null and void," the elements necessary to establish a new promise are gone.

Being ineffectual as an assignment, a valid admission or acknowledgment cannot be culled from it.

Merriam *vs.* Leonard, 6 Cush., 153.
Sumner *vs.* Sumner, 1 Met., 394.

Like efforts to use unstamped instruments in evidence have failed in England.

Williams *vs.* Gerry, 10 M. & W., 296.
Evans *vs.* Prothero, 2 Mac. & G., 319.
Keane *vs.* Janis, 2 C. & K., 725.
Sweeting *vs.* Hulse, 9 B. & C., 365.

b. Because the assignment is not clear and explicit of the particular debt and its amount. The indebtedness mentioned in the deed of trust was $22,000, manifested by three promissory notes, and of these two only are sued, and one of these was proved to be subject to large credits.

Routledge *vs.* Ramsey, 8 A. & E., 221.
Bell *vs.* Morrison, 1 Pet., 365.
Miller *vs.* Basshore, 83 Pa. St., 356.

c. Because the new promise should have been specially replied.

Wood on Lim., 16.
Miller *vs.* McIntyre, 6 Pet., 64.

d. Because the instrument varies the contract manifested by the notes in the matter of interest and was inadmissible to support the declaration.

II.

If the assignment was properly admitted in evidence the court erred in taking from the jury the determination of the question of acknowledgment and new promise. The assignment required the explanation of extrinsic facts to make it intelligible, to ascertain its meaning and purpose, and to apply it to its object; and therefore the deeds of trust to

William Thompson, and to Taylor, Cross, and Bacon and the circumstances attending the origin of the assignment were offered in evidence. The defendant also offered evidence of his situation at the time of the assignment, of the circumstances surrounding the transaction, and of the purpose of the assignment. The extrinsic evidence tended to rebut and repel any implication of a new promise. The very notes secured by the deed of trust were payable *solely* out of the property and created no personal liability.

Wood on Lim., 163, sec. 93, and p. 217.
Morrill *vs.* Frith, 3 M. & W., 402.
Wetzell *vs.* Buzzard, 11 Wheat., 309.
Baneda *vs.* Silsbee, 21 How., 168.
West *vs.* Smith, 101 U. S., 270.
White *vs.* Jordan, 27 Me., 370.
Waynman *vs.* Kynman, 1 Exchg., 118.

III.

The assignment is remarkable in not naming the plaintiff, in not assigning directly to him, in providing that the proceeds of the claim shall go to the trustee named in the deed of trust, and be by him applied, thereby indicating with sufficient force to justify, if not to *compel*, the inference that the proposition had reference, not to the *personal* liability of the defendant, but *solely* to the liability of the property under the deed of trust. The defendant's third prayer should have been granted.

Dorr *vs.* Swartwout, 1 Blatch., 179.

IV.

The sixth bill of exceptions shows that the jury rendered a verdict "for the amount due on the notes, with interest at

6 per cent. from maturity," and the clerk, under the direction of the court, after the immediate discharge of the jury and in their absence, exercised and performed their functions, ascertained the amount due, changing the rate and time of interest as found by the jury, amended the verdict, and entered judgment thereon. The verdict as rendered was void. It was beyond the power of the court to amend it, and, without reference to the evidence, it was impossible to ascertain what was the amount due, as the declaration claims the full amount of the face of the notes, and the record shows that there were several credits.

Hirth *vs.* Lynch, 96 Ills., 409.
Fryberger *vs.* Carney, 26 Minn., 84.
Gerhat *vs.* White, 40 N. J. Law, 242.
Fries *vs.* Mack, 33 Ohio St., 52.
Neville *vs.* Northcutt, 7 Cold., 294.
Fromme *vs.* Jones, 13 Iowa, 474.
McArthur *vs.* Porter, 1 Peters, 626.
Hodges *vs.* Easton, 106 U. S., 408.

V.

It is submitted that the court below erred in setting aside the verdict in the first trial because of the rejection of the assignment by the trial justice, and that it erred in admitting the assignment in evidence, and that the judgment should be reversed and the cause remanded to the court below, with directions to enter judgment upon the first verdict.

Coughlin *vs.* D. C., 106 U. S., 7.

A. C. Bradley,
Wm. F. Mattingly,
Counsel for Plaintiff in Error.

122-23

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 264.

ALEXANDER R. SHEPHERD, PLAINTIFF IN ERROR,

vs.

JOHN W. THOMPSON.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE DEFENDANT IN ERROR.

M. F. MORRIS,
H. H. WELLS,
For Defendant in Error.

JUDD & DETWEILER, PRINTERS.

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Coughlin *vs.* D. C., 106 U. S., 7.

A. C. Bradley,
Wm. F. Mattingly,
Counsel for Plaintiff in Error.

122-231

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OCTOBER TERM, 1886.

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JOHN W. THOMPSON.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE DEFENDANT IN ERROR.

M. F. MORRIS,
H. H. WELLS,
For Defendant in Error.

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In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE DEFENDANT IN ERROR.

I.

STATEMENT OF CASE.

This suit was instituted March 11, 1880, on two promissory notes, one for $7,000 and the other for $8,000, both bearing date on the 10th of March, 1873, and payable with interest at the rate of eight per centum, the first in two years and the second in three years after date. These notes had been given by Shepherd to Thompson on account of the purchase-money of some real estate sold by the latter to the former, and they had originally been secured by a deed of trust by way of mortgage on the land sold given by Shep-

herd to one William Thompson as trustee, but the security had been wholly or in great part released, and was unavailable to pay the indebtedness. The releases had been executed by Thompson from time to time to accommodate Shepherd.

The defendant pleaded the general issue and the statute of limitations; but the indebtedness was not controverted, and the statute of limitations was, in fact, the only defense.

The plaintiff joined issue upon the pleas, and relied upon a new promise or an acknowledgment of the indebtedness within the period of limitations to take the case out of the operation of the statute.

There were two trials. Upon the first the justice holding the court ruled against the plaintiff, but his rulings were unanimously reversed by the general term and a new trial ordered. Upon a second trial there was a verdict and judgment for the plaintiff for the amount due on the notes. The judgment was affirmed by the general term.

Six bills of exception were taken by the defendant to the rulings of the court. The burden of these is: 1st, That evidence of a new promise was not admissible under the issue joined; 2d, That objectionable evidence was admitted to show such new promise; 3d, That the jury was not instructed to consider accompanying circumstances; and 4th. That the verdict of the jury was not recorded as rendered.

II.

BRIEF OF ARGUMENT.

1.

The first bill of exception seeks to raise a question as to the admissibility of evidence of a new promise under the pleadings in the case. (Record, p. 23, 24.)

The plea of limitations is, "that the alleged cause of action did not accrue within three years before this suit." (Record,

p. 4.) And the plaintiff's replication to it is: "The plaintiff joins issue with the defendant upon his pleas." (Record, p. 5.)

Rule 33 of the General Rules of the Supreme Court of the District of Columbia, which is the rule of that court that bears on this subject, provides as follows:

"The joinder in issue may be, 'The plaintiffs join issue upon the defendant's first plea,' 'The defendant joins issue upon the plaintiff's replication to the first plea,' and this form of joinder shall be deemed to be a denial of the substance of the pleading to which it relates, and an issue thereon."

The old formality was a replication to the effect "that the plaintiff's cause of action did accrue within three years before the institution of this suit;" and then the defendant joined issue upon that replication. The replication was merely "a denial of the substance of the pleading to which it relates;" and the Rule 33 just cited gave the same effect to the joinder of issue. So the joinder of issue here is to be considered as well a general replication as a joinder of issue.

Now, it is not necessary to reply a new promise specially. It has always been allowed to prove it under the general issue.

Oliver *vs.* Gray, 1 Harris & Gill, 204.
Leaper *vs.* Talton, 16 East., 420.
Tanner *vs.* Smoot, 6 B. & C., 603.
Upton *vs.* Else, 12 Moore, 303.
Little *vs.* Blunt, 9 Pick., 488.
Baxter *vs.* Penniman, 8 Mass., 133.

The position of the plaintiff in error in the first bill of exceptions is, therefore, untenable and unsubstantial.

2.

The second bill of exceptions presents the question whether a certain instrument of writing was admissible to prove a new promise.

As already stated Shepherd had executed a deed of trust or mortgage to secure the payment of the notes in suit. In this deed (Record, p. 24) the indebtedness was fully described. Subsequently, on June 21, 1877, within the period of limitations in this case, the mortgaged property having been released, as heretofore stated, the plaintiff in error, who had previously thereto made an assignment to trustees for the benefit of his creditors, retaining the right to negotiate and settle with his creditors, with the concurrence of his trustees, gave, or attempted to give, to the defendant in error further security for the indebtedness by pledging and covenanting with him that the proceeds of a certain claim against the United States for the rent of certain real estate in the city of Washington should, when realized, be applied towards the payment of that indebtedness. The instrument of writing by which this security was given is found on page 25 of the record.

To its introduction in evidence it was objected, 1st, That it was inadmissible under the form of the issue; 2d, That there was a variance between the promise alleged to be evidenced by said assignment and the declaration; 3d, That the assignment does not contain such an acknowledgment as the law would imply therefrom a new promise; and 4th, That under the law the paper was absolutely null and void and not competent evidence for any purpose. The so-called *assignment* mentioned in these objections is the instrument of writing hereinbefore referred to.

The first objection is the same that has already been disposed of—that is, that evidence of a new promise was not admissible under the issue in the case.

For the objection that there was a variance between the promise evidenced by this paper and the promise set forth in the declaration, the only ground is that the promise in the declaration is to pay a certain sum of money, with interest at eight per centum, and the promise in the so-called assignment is to pay the indebtedness mentioned in the

deed of trust (which is the same indebtedness that is set forth in the declaration), with interest at eight per centum *until paid.* The point seems to be that the addition of the words "*until paid*" constitutes a variance. In other words, to admit an indebtedness, and to promise to pay it, *and more too*, is not a new promise to pay the indebtedness. The force of this reasoning is not very apparent.

The third objection is, that the so-called assignment does not contain any such acknowledgment of the indebtedness as that the law would imply from it a new promise to pay it. The assignment distinctly acknowledges and recognizes the indebtedness by reference to another paper, in which that indebtedness is specifically described, and which is in evidence in the case. It distinctly promises to pay that indebtedness; and it distinctly gives security for the payment of it. What more than this could be required to constitute a new promise? Was there ever a new promise more distinctly and unequivocally and solemnly evidenced? The evidence is not by loose talk, but by a carefully drawn instrument in writing. If this paper is not evidence of a new promise it is impossible to draw a paper that would be. If it be necessary to refer to elementary law on the subject of what constitutes a new promise, we would cite, among other authorities, the following:

Moore *vs.* Bank of Columbia, 6 Pet., 86.
Bell *vs.* Morrison, 1 Pet., 352.
Randon *vs.* Toby, 11 How., 493.
Walsh *vs.* Mayer, 111 U. S., 31.

But the most hotly contested objection in this connection was the fourth—that the so-called assignment evidenced by the paper of June 21, 1877, was null and void by law, and was not therefore competent evidence for any purpose. This objection is sought to be sustained under the supposed authority of the case of Kirk *vs.* Spofford, 97 U. S., 484, and the provisions of the act of Congress of February 26, 1853,

chap. 81, sec. 1 (10 Stat., 170), incorporated into the Revised Statutes as section 3477, which is as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

This statute has several times been the subject of consideration by this court.

U. S. *vs.* Gillis, 95 U. S., 407.
Erwin *vs.* U. S., 97 U. S., 392.
Spofford *vs.* Kirk, 97 U. S., 484.
Goodman *vs.* Niblack, 102 U. S., 556.
St. Paul R. R. *vs.* U. S., 112 U. S., 733.

In the case of Goodman *vs.* Niblack, the Court says:

"The language of the statute includes 'all transfers and assignments of any claim upon the United States, or of any part thereof or interest therein.' These words are broad enough, if such were the purpose of Congress, to include transfers by operation of law or by will. Yet in that case (Erwin *vs.* The United States, 97 U. S., 392,) we held it did not include transfers by operation of law, or in bankruptcy; and we held it did not include a transfer by will. The obvious reason of this is that there can be no purpose in such cases to harrass the Government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim. That in such cases the exigencies of the party who held the claim justified and required the transfer that was made. *In what respect does the voluntary assignment by an insolvent debtor of all his effects for the benefit of all his creditors, which effects must, if the assignment is honest, include a claim against the Govern-*

ment, differ from the assignment which is made in bankruptcy? There can here be no purpose to bring improper means to bear in establishing the claim, nor can it be readily seen how the government can be embarrassed by such an assignment. The claim against the government is not specifically mentioned and is obviously only included by the just and proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil at which Congress aimed in the act of 1853.

"It is also to be remarked that the government had recognized Sloo's original assignment of his contract to Roberts, Law, and McIlvaine, as trustees, by permitting them to perform the contract and receive pay under it for years."

The case of Goodman *vs.* Niblack is precisely parallel to the case at bar. In this present case A. C. Bradley, being the owner of premises No. 915 E street, in the city of Washington, had rented them to the Government for the use of the Post Office Department. Subsequently, and immediately after the renting, Bradley sold and conveyed the property to Shepherd. A misunderstanding arose in regard to the rent, and there was rent unpaid and in arrears when Shepherd, becoming insolvent, on November 15, 1876, transferred and assigned all his property to trustees (Taylor, Cross, and Bacon) for the benefit of his creditors. He reserved no preferences in his assignment, as had been done in the transactions out of which grew the case of Goodman *vs.* Niblack, but he reserved to himself a right to negotiate and settle with his creditors, and, with the consent of his trustees, to use the property conveyed to them in settlement with his creditors. Under this reservation of power he undertook to use the claim against the United States in settlement with the plaintiff. Under the decision in the case of Goodman *vs.* Niblack, Shepherd's general assignment vested in the trustees the claim against the United States as well as all his other property, and his settlement with Thompson was of the same character as the preference declared in the case of Goodman *vs.* Niblack, and more unobjectionable.

In the present case, too, as in the case of Goodman *vs.* Niblack, the trustees had been recognized in the Court of Claims and by the Government in drawing drafts in their favor.

In fact, the similarity of the two cases is almost perfect, and if the assignment in the one was legal and proper it certainly was so also in the other.

But when this so-called assignment of June 21, 1877, is carefully examined, it will be found to be no assignment at all in contemplation of law, but simply and in terms a covenant on the part of Shepherd and his trustees that, when they realized the money on this claim, they would apply it to the payment of Thompson's claim, and that they would indorse and deliver to the trustee named in the deed of trust of March 10, 1873, any draft or check that might be issued in payment of the claim. We suppose there was no law to prohibit the plaintiff in error from paying his just debts, or from applying to such payment the proceeds of any claim that he might have against the United States; and it does not appear why it should be wrong for him to *covenant* to do that which it would be his duty to do. It would be an absurdity to suppose that the act of 1853 was intended to prohibit a person from agreeing that when he succeeded in procuring the payment of a certain claim, he would apply the proceeds to the payment of his debts.

A suit is now pending in this Court on appeal (Shepherd *vs.* Thompson, No. 552), the purpose of which is to enforce this agreement of June 21, 1877, under the principles of the decision in the case of Goodman *vs.* Niblack, and where the court below, after full consideration, upheld the validity of the instrument.

But, after all, it makes no difference whatever in the present case whether the so-called assignment of June 21, 1877, was or was not an illegal transaction and obnoxious to the prohibitions of the act of 1853. This is not a suit to enforce the assignment. The paper was not offered in evidence as

the basis of any title or as a cause of action, but as an item of evidence to show that, on the day of its date, the defendant acknowledged the indebtedness here sued on, and promised to pay it.

Now it is an elementary principle of evidence that an instrument of writing invalid to convey title is admissible in evidence for the purpose of showing admissions made by the parties; and this is the sole purpose for which the paper was offered in this case.

Matheson *vs.* Ross, 13 Jur., 307.
Evans *vs.* Prothers, 1 De G. M. and G., 572.
Jackson *vs.* Campbell, 5 Wendell, 572.
Jewel *vs.* Schrœppel, 4 Cowan, 566.
Williams *vs.* Sherman, 7 Wendell, 109.
Brohawn *vs.* Van Ness, 1 Cranch C. C., 366.
Taylor's Landlord and Tenant, sec. 650.
Greenleaf on Evidence, vol. 1, sec. 264.

The admission, therefore, of this paper in evidence for the purpose of showing an acknowledgment of a present subsisting indebtedness, with an expression of willingness to pay it, from which the law implies a new promise, was in no way erroneous.

3.

The third bill of exceptions is based upon the rejection by the court below of five several instructions requested by the plaintiff in error here (defendant below), each and all of them, to the effect that, when the statute of limitations is relied upon as a defense, and a new promise is sought to be shown, the jury should take into consideration any "*accompanying circumstances* which repel the presumption of an intention or promise to pay." (Record, p. 30.)

The all-sufficient objection to these instructions was, as the court below stated in its charge to the jury (Record, p.

34), that there was no such "*accompanying circumstances.*" There were no circumstances of any kind adduced in evidence that had the remotest tendency to repel the presumption of a new promise which the law raised from the transaction of June 21, 1877.

4.

The fourth bill of exceptions is taken to the granting of three several instructions requested by the defendant in error (plaintiff below), to the effect that the paper of June 21, 1877, was evidence of a new promise. And this point, of course, need not here be further considered.

5.

The fifth bill of exceptions is to the charge of the court; but there is nothing in it that has not been already raised by the preceding bills.

6.

The sixth and last bill of exceptions is based upon an alleged alteration or amendment by the court of the verdict rendered by the jury.

The verdict of the jury was: "We find for the plaintiff for the amount due on the notes, with interest at six per cent. from maturity." And the court directed the clerk to ascertain the amount due by calculation, and so to enter the verdict for the specific amount due, which was $11,442.84, with interest.

All that need be said of this point is that the action complained of was in accordance with the universal practice of the court, as well as in accordance with the large power of the court to amend verdicts. Moreover, this is a matter committed by statute to the discretion of the court that

tries the case, and is not the subject of review in an appellate tribunal.

Act of 1789, ch. 20, sec. 32 (1 Stat., 91).
Revised Statutes, sec. 954.
Parks *vs.* Turner, 12 How., 39.
Murphy *vs.* Grant, 2 How., 279.
Roach *vs.* Hulings, 16 Pet., 321.
Paterson *vs.* U. S., 2 Wheaton, 222.
Liter *vs.* Green, 2 Wheaton, 307.

7.

It is very apparent, upon the whole record, that the verdict and judgment in this case are just and ought to stand.

It may be proper, however, to add that this is not a meritorious case for the plaintiff in error. Having induced the defendant in error to sell him his land upon a credit which has proved worthless, he succeeded also in inducing him to part with his security and to relinquish his vendor's lien. Then he professed to give him other security, which he now repudiates and which his present avowals would tend to show he had the intention at the time he gave it to repudiate. Having secured sufficient delay to enable him to plead the statute of limitations with some appearance of plausibility, he takes opportunity in an *ex parte* affidavit to indulge in uncalled for abuse of the defendant in error. This should not commend his case to favorable consideration. In fact, there is nothing whatever in his case to commend it to favorable consideration from any point of view.

M. F. Morris,
H. H. Wells,
For Defendant in Error.